BEFORE
THE PUBLIC SERVICE COMMISSION
OF SOUTH CAROLINA
DOCKET NO. 2020-125-E

IN RE:	)	**DESC's Return to the DOD's**
	)	**Motion for Partial Summary**
Application of Dominion Energy South	)	**Judgment Regarding Proposed**
Carolina, Incorporated for Adjustment of	)	**Amendments to Section V of DESC's**
Rates and Charges	)	**General Terms and Conditions**
	)	

Dominion Energy South Carolina, Inc. ("DESC" or the "Company") files this return to the motion for partial summary judgment filed by the Department of Defense and all other Federal Executive Agencies ("DOD"). The Company timely files this return pursuant to S.C. Code Ann. Reg. 103-829. DOD seeks summary judgment as to the supplemental proposed revisions to Section V. of the Company's General Terms and Conditions by claiming 31 U.S.C. § 1341 entitles it to judgment as a matter of law from this Commission. This flawed argument should be rejected. First, the Commission lacks jurisdiction to resolve this issue. Second, 31 U.S.C. § 1341 offers the government a potential defense to a claim for contractual indemnification, but it does not allow for a preemptive attack on terms of a contract as argued by the DOD. Third, summary judgment is improper because an issue of fact exists as to whether legislation appropriated sufficient funds to cover any indemnification owed by DOD.

Applicable Standard

"Since it is a drastic remedy, summary judgment should be cautiously invoked so that no person will be improperly deprived of a trial of the disputed factual issues." Baughman v. American Tel. and Tel. Co., 306 S.C. 101, 112, 410 S.E.2d 537, 543 (1991). Summary judgment can be granted only when it is perfectly clear that no genuine issue of material fact is involved and inquiry into the facts is not desirable to clarify application of the law. Hudson v. Zenith Engraving

Co. Inc., 273 S.C. 766, 771, 259 S.E.2d 812, 814 (1979). Summary judgment is not appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law. Tupper v. Dorchester County, 326 S.C. 318, 325, 487 S.E.2d 187, 191 (1997); Baugus v. Wessinger, 303 S.C. 412, 415, 401 S.E.2d 169, 171 (1991). Even when there is no dispute as to evidentiary facts, but only as to the conclusions or inferences to be drawn from them, summary judgment should be denied. Tupper, 326 S.C. at 325, 487 S.E.2d at 191.

All ambiguities, conclusions, and inferences arising from the evidence must be construed most strongly against the movant. True v. Monteith, 327 S.C. 116, 117, 489 S.E.2d 615, 616 (1997). The party seeking summary judgment has the burden of clearly establishing the absence of a genuine issue of material fact. Baughman, 306 S.C. at 115, 410 S.E.2d at 545.

Argument

Assuming without conceding that the supplemental proposed revisions to Section V. of the Company's General Terms and Conditions constitute a government contract, the Commission lacks jurisdiction to adjudicate whether DOD can be required to indemnify the Company for damages to a third-party arising from the actions or conduct of DOD. Congress vested such jurisdiction with the Federal Court of Claims for specified types of claims arising under contract against the United States, which includes DOD. 28 U.S.C. § 1491 (2006) (known as the "Tucker Act"). In order to bring a contractual indemnity claim under the Tucker Act, the contracting party need establish only that enforcement of the indemnity provision is contractually based rather than based on tort law or some other legal right. Kenney Orthopedic, LLC v. U.S., 83 Fed. Cl. 35 (Fed. Cl. 2008). Therefore, the Tucker Act waived sovereign immunity with regard to claims for contractual indemnification. See United States v. Mitchell, 463 U.S. 206 (1983) (holding that "by

giving the Court of Claims jurisdiction over specified types of claims against the United States, the Tucker Act constitutes a waiver of sovereign immunity with respect to those claims").

South Carolina recognizes a claim for indemnification under a contract to be an action arising under contract, not tort. See, e.g., Concord & Cumberland Horizontal Prop. Regime v. Concord & Cumberland, LLC, 424 S.C. 639, 647, 819 S.E.2d 166, 172 (Ct. App. 2018) ("Courts will construe an indemnification contract in accordance with the rules for the construction of contracts generally"). Thus, should the Company ever seek indemnification from the DOD based on the terms of the supplemental proposed revisions to Section V. of the Company's General Terms and Conditions, then the Federal Court of Claims would adjudicate this issue. This Commission cannot do so. Likewise, the Commission cannot grant summary judgment on the proposed language.

Even if the question was properly before this Commission, summary judgment should still be denied. As an initial matter, the Anti-Deficiency Act, 28 U.S.C. § 1341, relied upon by DOD qualifies as a defense to a claim for indemnification. It does not allow the government to use it as a sword to preemptively invalidate a contract. See, generally, Lakeland Partners, LLC v. U.S., 2008 U.S. Claims LEXIS 474 (Fed. Cl. 2008) (addressing the pleading requirement necessary to the "affirmative defense" of the Anti-Deficiency Act and recognizing the self-evident reading of the Anti-Deficiency Act is a limitation on the amount expended or obligated by officers and employees of the United States but does not reach so far as to a claim that it is not tantamount to an offensive claim that the government lacked authority to contract).

DOD bases its position on the blanket unsupported assumption that any possible indemnification award would be in excess of amounts appropriated to DOD for operation and maintenance and, therefore, would violate the Anti-Deficiency Act. See Motion p. 2. The issue

of whether Congress appropriated sufficient amounts to cover a claim of contractual identification against the DOD would be a quintessential question of fact to be determined at the time of the claim. For instance, Congress appropriated significant amounts—over ***$37 billion***[1]—to DOD for operation and maintenance, which includes payment of utility services. Congress further appropriated operation and maintenance funds to each branch: $41,449,293,000 to the Army; $51,417,389,000 to the Navy; $7,945,854,000 to the Marine Corps; and $ 44,662,729,000 to the Air Force. A claim from the DOD that such sums would be insufficient to cover an indemnity judgment seems far-fetched. This Commission cannot merely accept the unsupported claim by the DOD that an indemnity judgment would be "in excess of an appropriation." DOD would have the ability, after discovery, to prove that factual issue in an indemnity action by the Company against DOD, but that factual issue precludes a grant of summary judgment to DOD in this matter.[2]

Conclusion

Based on the foregoing, summary judgment is inappropriate, and the Commission should deny DOD's motion for partial summary judgment.

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[1] The appropriation totaled $37,238,522,000 "for expenses, not otherwise provided for, necessary for the operation and maintenance of activities and agencies of the Department of Defense (other than the military departments)."

[2] The Company anticipates that DOD will cite in reply cases that state unlimited indemnification provisions violate the Anti-Deficiency Act. The Commission should note in reading those cases that such findings were made in a separate litigation after the enactment of the contract containing the indemnification language. In none of those cases did a regulatory body, such as this Commission, rule on that issue or that such indemnification should not be included in the contract. Rather, a court of competent jurisdiction addressed a claim by a company for identification by the government as part of separate and unrelated lawsuit.

Respectfully submitted,

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Columbia, South Carolina